No. 4890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. D. PINE,

Appellant.

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the EAST BAY MUNICIPAL UTILITY DISTRICT, JOHN H. KIMBALL, Individually and as Secretary of said District, and of the Board of Directors thereof, and GEORGE C. PARDEE, as President of the Board of Directors of said District,

Appellees.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES.

INTRODUCTORY.

We sought and obtained by stipulation from the attorneys for appellant and appellees consent to filing of this brief in support of the position of appellees.

This brief is submitted on behalf of Twohy Brothers Company and J. F. Shea Company who jointly hold large and important contracts from the appellee, East Bay Municipal Utility District, for the construction

of the pipe aqueduct of the Mokelumne River project by which the water will be brought from the Lancha Plana Dam Site to the municipalities forming the appellee district.

Twohy Brothers Company and J. F. Shea Company were named as defendants in the original complaint but were not served with process. They were awarded contracts by the District on September 25, 1925, since which time they have performed a large part of the work covered thereby and it becomes apparent that they are directly and vitally interested in the affirmance of the steps taken by the District seeking to consummate the construction of the entire Mokelumne River project which is under attack in this case by appellant.

We have read the briefs submitted by appellant and appellees and are convinced that the appellees have sufficiently and ably covered the issues involved in the case and successfully answered the points made by appellant. It has occurred to us, however, that our interest is of sufficient magnitude to justify a disclosure of our position to the court together with such supplementary suggestions as we feel may consistently be added to the views expressed so ably by counsel for appellees.

I.

THE FACTS ALLEGED DO NOT CONSTITUTE A VALID CLAIM IN EQUITY.

BY THE ORGANIC LAW UNDER WHICH IT IS ORGANIZED, THE APPELLEE DISTRICT IS SPECIFICALLY GIVEN POWER TO ACQUIRE PROPERTY BY LEASE AND THE LICENSE TAKEN BY THE DISTRICT FROM THE UNITED STATES AND UNDER ATTACK HERE BY APPELLANT AS IN EXCESS OF ITS POWER FOR THE DISTRICT TO TAKE, BEING IN REALITY A LEASE, THE ACTION OF THE DISTRICT IS CLEARLY WITHIN ITS POWERS.

The law is well settled that the courts will not interfere with the discretionary acts of public boards when performed in the exercise of their authority and in the absence of fraud. Counsel for appellees has made this point and ably supported it with authorities in his brief.

There being no claim of fraud here involved it becomes necessary only for the court to determine whether the action of the board, which is under attack here, was in the exercise of the discretionary powers vested in the board.

(a) The District is Empowered to Take Property by Lease.

The complaint alleges in paragraph III the organization and existence of the District under an Act of the Legislature of the State of California, approved May 23, 1921. (Trans. p. 3.)

Section 12 of this Act, in defining the powers of the District, provides among other things that the District may

> "take by grant, purchase, gift, devise, *or lease or otherwise acquire,* and to hold and enjoy, and to lease or dispose of, real and personal property of every kind within or without the District neces-

sary to the full and convenient exercise of its powers." (Italics ours.)

Statutes 1921, page 251.

It cannot be disputed that the power to lease real property for the exercise of its corporate functions is specifically granted by the quoted provision.

Let us assume that land acquired by the District can only be acquired by lease. It could not be claimed for this reason that the District should refuse to act because it was without power to take by lease. In such a case the Statute would mean nothing. The Legislature foresaw the possibility of such a contingency, and, in order that the district in such a case might properly function, gave the District the power to acquire the needed land by lease. The grant of this power is self-evident and does not require citation of authority in view of the clear provision of the Statute.

But aside from the fact that the power to acquire lands by lease is specifically given the District by the Act the right to do so is implied by law. The District is in fact a municipal corporation.

In re Issuance of Bonds of Orosi Public Utility District, 196 Cal. 43.

"A municipal corporation may take a lease of real property for a legitimate corporate purpose." 28 *Cyc.* 609 and cases there cited.

This very question has been decided by the Supreme Court of the State of California in the case of *City and County of San Francisco v. Boyle,* 195 Cal. 426; 233 Pac. 965, in which a writ of mandate was sought to compel the respondent, City Auditor, to audit and approve a claim and demand on account of an agree-

ment made between the municipality and an exposition company pursuant to proceedings had before the board of supervisors.

In that case, speaking for the court it was said by Justice Richards:

> "The first contention which the respondent makes in support of his refusal to audit and approve said demand is the contention that the City and County of San Francisco has, under the terms of its charter, no power to enter into a lease of privately owned real estate. We are disposed to hold that this general objection is without merit. The charter of said municipality, in Article 1, Section 1, thereof, provides that it 'may purchase, receive, hold and enjoy real and personal property.' * * * On the other hand, it is a general rule of interpretation applicable to charters that the broad power to 'purchase, receive, hold and enjoy real and personal property' embraces and includes the lesser power to lease the same classes of property. 3 Dillon on Municipal Corporations 5th ed., p. 1593; Hackett v. Emporium Borough School Dist., 150 Pa. 220, (24 Atl. 627); 28 Cyc., pp. 604, 605 and cases cited."

A municipal corporation has power to lease real estate needed by it to carry out any of its acknowledged powers and purposes.

Davies v. City of New York, 83 N. Y. 207.

(b) The License Issued From the Federal Power Commission to the District is in Reality a Lease.

There being no doubt that the District may acquire real property by lease, the question arises whether or not the "license" issued to the District by the Federal Power Commission is within the meaning of the term "lease". We respectfully submit that it is.

The pertinent provisions of the Federal Water Power Act (41 U. S. Stats. at Large, 1063) follow.

Section 3 defines project:

"Project means complete unit of improvement or development, consisting of a power house, all water conduits, all dams * * * all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit."

Section 4 (a) * * * The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, etc."

Section 6. "That licenses under this Act shall be issued for a period not exceeding fifty years * * *. Licenses may be revoked only for the reasons and in the manner prescribed under this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice."

Section 9 (e) "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the *use, occupancy* and *enjoyment* of its lands or other property; and for the expropriation to the government of excessive profits until the respective States shall make provision for preventing excessive profits or the expropriation thereof to themselves, etc. * * *"

Section 14. "That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in Section 3 hereof, and covered in whole or in part by the license, or the right to take

over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission."

Section 16. "That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of taking over thereof, less the reasonable value of any improvements that may

be made thereto by the United States and which are valuable and serviceable to the licensee."

Section 26. "That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the District Court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder."

With the foregoing sections in mind let us examine the "license" issued to the District by the Federal Power Commission pursuant to and in accordance with the terms of the Federal Water Power Act.

It has been held that the "license" issued by the commission under this very act constitutes a contract between the United States and the "licensee".

Alameda Power Co. v. Gulf Power Co., 283 Fed. 606.

In a general way, the test to determine whether an agreement for the use of real estate is a lease or a license is whether the contract gives exclusive possession of the premises against the world, inclusive of the owner, in which case it is a lease, or whether it merely confers a license to occupy under the owner.

Certainly the agreement is something greater and broader than a mere license. A license is revocable at the pleasure of a licensor. (25 *Cyc.,* 645.) How is the agreement in question revocable? Is it at the pleasure of the licensor? An examination of the perti-

nent sections of the Act, to-wit, Section 6 discloses that the "licenses" may be revoked only for the, reasons and in the manner prescribed under the Act and Section 26 provides the government may institute proceedings in equity for the purpose of revoking for violation of its terms any "license" issued; it also provides that the government may correct by injunction or other process any act of commission or omission in violation of the provisions of the Act. The answer, then to our question is that the so-called "license" is not revocable at the pleasure of the "licensor". Clearly, if it were, there would be no necessity for the provision that the government may take legal proceedings for its cancellation, nor would its revocation be dependent on prior violation of its conditions. The government through the commission, is definitely limited as to the time and manner in which it may revoke the agreement and the only conclusion to be drawn is that in issuing the "license" the commission has granted rights, the power to revoke which has passed from it and must be determined by litigation. Therefore not being subject to revocation the agreement is more than a license.

Morrill v. Mackman, 24 Mich. 282, 9 Am. Rep. 124.

> "A license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest it in. * * * It may be given in writing or by parol; it may be with or without consideration; *but in either case it is subject to revocation,* though constituting a protection to the party acting under it until the revocation takes place." (Italics ours.)

In *Coney Island Co. v. McIntyre-Paxton Co.,* 200 Fed. 901, wherein *Morrill v. Mackman,* supra, was

cited, the court, through Knappen, C. J., said at page 905:

> "We think it a misnomer to call the agreement before us a mere license. As construed below, it was intended to continue merely at the will of the plaintiff. It recognized an interest in defendant in the qualified use and possession of plaintiff's land. It was intended to constitute a limitation upon plaintiff's sole use and possession of its land, so far as inconsistent with defendant's qualified and concurrent right of possession, and to the extent necessary for the performance of the contract. It was not for an indefinite or permanent term, in a strict sense, but was to continue during a period whose limits were determined, although as yet uncertain in years. It pertained to the use of personal property, in whose beneficial use plaintiff was directly interested. It provided for action to be done on plaintiff's land for its benefit, not merely to be derived from its interest in the defendant, but through compensation to be paid directly to plaintiff for right to so operate. The defendant, moreover, as well as the plaintiff, was under express obligation to perform it. Such rights, we think (if effectively conveyed), amount to an interest in the land, as distinguished from a mere license. Stambaugh v. Smith, 23 Ohio St. 584, 591; Ormsby v. Ottman (C. C. A. 8), 85 Fed. 492, 497, 29 C. C. A. 295; 4 Words and Phrases, 3696 and following."

The fact that the Act calls it a license does not matter.

Denecke v. Miller, 142 Iowa 486, 119 N. W. 380.

> "We have no doubt that the arrangement made by Miller & Son with Terry, although called a license, was a lease. It was a subletting or underletting of a part of the premises, and, notwithstanding the paper signed by the parties names it as a license, courts will look beyond the form of the transaction to discover its true import."

The agreement in the instant case is one covering the use, occupation and enjoyment by the District of certain lands owned by the United States, wherein the District may impound water for reservoir purposes during the term of the contract. Section 9 (e) of the Act provides, *inter alia,* that the "licensee" shall pay to the United States reasonable annual charges to recompense it for the "use, occupancy and enjoyment" of its lands. The right to the occupation of the land covered by the contract is certainly exclusive as to any strangers to the agreement; if it were not so the agreement would be useless and without purpose. According to the terms set forth in Section 4 (a) the "licensee" must give the commission or its agents free access to the project at all reasonable times. It it be necessary, and it must be, for it is so provided by the Act, that the commission, the "licensor", or, as we claim, the lessor, obtain the permission of the "licensee", or lessee, to come upon the lands, then the contract gives the latter exclusive possession of the premises against the commission, which is the United States, the owner. Therefore we have an agreement by which is given to the District exclusive possession of these lands against the world, including the owner.

Section 6 provides the "licenses" issued under the Act shall not be for a period in excess of fifty years.

These three elements, viz., the consideration or rental, the right to possession and the definite term bring the agreement squarely within the rule laid down in the case of *Columbia Ry. Gas & Electric Co. v. Jones, et al.,* 119 S. C. 480, 112 S. E. 267, in which the question of whether the contract there involved was a

lease or a license was presented. In passing upon the point, the court said at page 271, (S. E.):

> "That this contract affects an alienation of the property of the power company and vests in the Columbia company an estate which is not less than a leasehold is beyond question. 'A tenant has been defined to be one who occupies the lands or premises of another in subordination to that other's title, and with his assent, express or implied.' 16 R. C. L., p. 531; Alexander v. Gardner, 123 Ky. 552, 96 S. W. 818, 124 Am. St. Rep. 378; Hawkins v. Tanner, 129 Ga. 497, 59 S. E. 225; 16 Am. & Eng. Enc. L. (26th Ed.) 164, 165; Wood on Landlord and Tenant, Sec. 1. The agreement embodies all the essential elements of a lease. There is (a) a grant of the possession and of the exclusive use and enjoyment of the power company's property (b) for a definite consideration or rental which is susceptible of being made certain, and (c) for a definitely expressed and certain term, which term is, 'in perpetuity' or until the agreement is terminated by default."

A leading authority on the question of the distinction between a license and lease is the case of *Alexander v. Gardner, et al.,* 123 Ky. 552, 96 S. W. 818. In this case the contract in question was held to be a lease against the insistence that it was a license and Carroll, J., stated:

> "* * * Under the contract in this case, the appellant had the right to occupy the land for three years in consideration of a stipulated sum and the privilege of erecting buildings, putting machinery on the land, and making roads and tramways to enable him to enjoy the premises for the purpose for which they were granted. He was not given the right to use the land except in the manner pointed out in the contract, nor is the use of the soil essential to create the relation of landlord and tenant. If a tenant has the right to enter

> upon the premises granted for a specified purpose, and to this extent may enjoy them, and he does this in subordination to the title of the owner and with his assent, and, as a consideration, pays money or other thing of value, or even without the payment of any consideration, the relation of landlord and tenant is created."

The analogy between the *Alexander* case and the case at bar is very clear. There the owner gave right to the use, occupation and enjoyment of the land in the same manner as the government gives it to the District in the case at bar. Furthermore in the *Alexander* case the lessee had the right to erect tramways, cabins, buildings and appliances necessary for the removal of the timber. In the case at bar the District has the right to erect such power houses, dams, conduits, waterways, etc., as it may deem necessary for the purpose of carrying out the rights it has under the "license". In the *Alexander* case at the expiration of the term of three years all of the refuse timber, barns, houses and other structures were to revert to the owner. So in the case of the "license", so-called, from the United States to the District, here under discussion the United States has the right at the end of fifty years to take back its premises with such structures on it as the District may have erected during the term of the agreement and, furthermore, it is agreed that at such time the government shall recompense the District for any and all such structures. It would seem, applying the reasoning of the *Alexander* case to the facts of the case at bar, that it is clear the agreement between the government and the District constitutes a good and valid lease, though styled a license.

Section 9 (e) of the Act provides for the expropriation to the government of excessive profits until such time as the state in which government lands may be situated shall make provision for the prevention of excessive profits or for the expropriation thereof to itself.

An analysis of this part of Section 9 (e) clearly shows that the government had in mind that the District was to enjoy some profits arising out of the use of its land and it therefore was to have in addition to the use, occupation and enjoyment, the actual benefit of the land.

In *Roberts v. Lynn Ice Co.,* 187 Mass. 402; 73 N. E. 523, the question arose as to the construction of the words "use and benefit of" which were incorporated in the agreement whereunder the defendant leased from the plaintiff certain property belonging to the latter.

The litigation arose over the question as to who should sustain the loss occasioned by fire on the premises, the defendant insisting that the agreement between the parties was a mere license and that therefore the loss should be borne by the plaintiff. In deciding the case the court stated as follows:

> "The question presented by this case, therefore, is the question of the construction of this instrument originally made by Roberts on January 29, 1898, and extended by the plaintiff, his widow, on January 27, 1902. By it, as originally drawn, Roberts 'does let to said Ice Company his ice business and privileges in * * * Lynn, at Flax Pond, with the use and benefit of his ice houses * * * for the term ending December 15, 1898 * * *'. The character of the instrument in the case at bar would hardly have been questioned had the thing

> let been the ice houses, in place of the 'use and benefit' of them and although the word 'use' is ordinarily employed when the owner contracts to give another person under him a right to occupy as a licensee, yet the words here are not 'the use of', but 'the use and benefit of', the ice houses, and the defendant took exclusive possession of them under the lease."

As stated before, a license is revocable at the will of the owner and nothing is necessary to terminate it but a declaration on the part of the licensor that the agreement between them is terminated instanter. To the contrary it is well settled and defined law that in the case of a lease, particularly where there is no definite term stated and also where the lessee holds over after the expiration of the term, reasonable notice must be given by the lessor to the lessee to quit the premises. The necessity to give such a notice to quit being one of the essential elements to terminate the relationship between lessor and lessee and it not being at all necessary in the case of a license it would seem that the presence of such a condition would clearly determine the agreement to be a lease rather than a license. So in Section 14 of the Act it is provided that upon not less than two years' notice in writing from the commission the United States shall have the right upon or *after the expiration of any license* to take over and thereafter to maintain and operate any of the projects defined in the Act.

It is clear from a reading of this Statute that the District has the right of possession to the government lands as against the owner, the United States, and furthermore that they shall not have to quit such

premises until they have been given reasonable notice so to do by the owner.

The fact that the presence of a provision for the serving of notice to quit determines an agreement to be a lease rather than a license was expressly decided in the case of *Shipley v. Kansas City,* 254 Mo. 1; 162 S. W. 137:

> "We have been somewhat troubled over the question as to whether the contract between Hodge and Hudson was a lease or a mere license. We have concluded that it was a lease * * *.
>
> The contract between Hodge and Hudson provided that the land was to be used for bill posting purposes. That would not of itself constitute a lease. But there are three things which mark the contract as a lease. It provides for a notice to vacate. That implies that Hudson was to have possession. Such notice was to be given in case Hodge wanted to use the land for other purposes. In the second place, a mere license implies that the licensor can use the land in any way not inconsistent with the license. But here it was clearly shown that Hodge parted with all right to use the land until after notice to vacate. Third, the parties in so many words provided for the payment of rent. The use of that term did not, of itself make it a lease. But the whole instrument taken together constitutes a lease and not a mere license."

The principle underlying all the foregoing decisions is that the actual provisions of the agreement between the parties is the determining factor in deciding the question of whether or not the agreement is a license or a lease.

In the case at bar the agreement is governed by the provisions of the Statute and is issued under and in accordance with the terms thereof. The agreement,

therefore, contains all of the elements necessary to constitute it a lease. Such being the case and the District both expressly and impliedly having the right to acquire the property by lease, the Board of Directors in making such a lease have performed a discretionary act in the exercise of their authority. Such an act is one with which the courts will not interfere and thus on the face of the complaint, it follows that the facts alleged do not constitute a valid claim in equity.

ANSWERING APPELLANT'S ARGUMENT ON THIS POINT.

Before passing from the point, however, we wish to call attention to a fallacy in the reasoning of appellant's brief wherein he urges that the Board is making a contract under which they give away or dispose of the property of the District, and are therefore acting beyond their authority.

On page 19 of the brief he cites a part of Subsection 5 of Section 12 of the Organic Act relating to the sale of surplus water and, in putting a construction upon this subsection, it is claimed by counsel that the only water that could be disposed of by the District to persons, firms, etc., outside the District is surplus water.

Counsel has overlooked the fact that immediately preceding the part of Subsection 5 of Section 12, which he cites, and being part of the same subsection, the District is empowered

> "to acquire, construct, etc. * * * within or without, or partly within or partly without, the District works for supplying the inhabitants of said District and municipalities therein, * * * with

> light, water, power, heat, etc. * * * also to purchase any of the commodities or services aforementioned from any other utility district, municipality or private company, and distribute the same."

It is respectfully urged that should the District purchase and operate water works situated partly without the limits of the District and which water works at the time of such purchase were already supplying water to people residing outside of the District it would not only have the power to distribute water to such people but it would be legally bound so to do whether or not such water be surplus. The disposal of water to people outside of the District, therefore, is not confined to such water as may be surplus and this was expressly decided in the case of *East Bay Municipal Utility District v. Railroad Commission,* 194 Cal. 603, where the Supreme Court of this State through Shenk, J., said at page 619:

> "The determination of the principal contention of the respondent in its favor and adversely to the petitioner's right to compel the valuation would be sufficient upon which to base a denial of the peremptory writ sought herein, but counsel appearing by leave of court and on behalf of the East Bay Water Company has advanced certain other objections to the right of the petitioner to proceed which seem to demand consideration at this time in order that further litigation involving the same questions may be avoided in the event the petitioner hereafter may become authorized to seek a valuation on the part of the Commission. It is insisted that if the petitioner has the legal right to demand a valuation by the Railroad Commission and if the Commission should make such valuation the petitioner would have no power under the Statute authorizing its formation to supply

water to territory and peoples without the district. The act provides that a municipal utility district shall have power 'to acquire, construct, own, operate, control or use, within or without, or partly within and partly without, the district, works for supplying the inhabitants of said district and municipalities therein * * * with * * * water * * * and to do all things necessary or convenient to the full exercise of the powers herein granted * * *. Whenever there is a surplus of water * * * above that which may be required for such inhabitants or municipalities within the district, such district shall have power to sell or otherwise dispose of such surplus outside of the district. * * *' Direct authority is thus given to the district to acquire property *without* the district, but because the power of the district to sell water without the district is limited to the 'surplus' it is contended that the valuation if made would be idle and of no avail, for the reason that the district has not authority under its organic act to furnish water outside the district except as the same may be surplus. The resolution of the board of directors of the district declares the necessity of acquiring the entire system, and that the same is indivisible and constitutes one system. In the same resolution the district declares that it would take the property subject to the duty to continue to supply the outside territory. The petitioner also sets forth the same facts and declarations in the petition herein. It is also further alleged that about ninety-three per cent of the water is supplied to people within the district and about seven per cent to people outside the district. Whether or not it be the declared policy of the district to continue such outside use, it would be its legal duty to do so as the successor of the East Bay Water Company (South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579 (93 Pac. 490), and cases cited). In that case the city of Pasadena was seeking to acquire the water works and system of the defendant corporation which was serving water users outside the city and within the corporate limits of the

plaintiff. The suit was brought to enjoin the defendants from transferring its properties. One of the questions presented was whether the city could acquire the property subject to the duty theretofore imposed on the water company to furnish water to the inhabitants of the plaintiff and be compelled to continue that service. It was held that the city of Pasadena could be compelled to put the water to the same use as the water company. It is true that the city of Pasadena had charter power to supply water to persons who lived outside the city limits, but it was contended that the supply of water outside its limits was not a municipal affair and therefore the city was subject to the limitations of the general law with reference to surplus water. It was held in effect that the supplying of water to outside territory under the circumstances was necessarily a matter incidental to the main purpose of supplying water to its own inhabitants. With reference to the duty of the city of Pasadena to continue the service and with reference to the character of the water as surplus water the court said at page 594: 'It will be obliged to put it to the same use as fully as that company is now compelled to do. Water which is in this manner dedicated to the use of an outside community cannot be at the same time surplus water subject to sale to others. The sale is already, in effect, accomplished. The city of Pasadena, with respect to this part of the water, will hold title as a mere trustee, bound to apply it to the use of those beneficially interested'. So in this case the petitioner would be acquiring the property outside the district as necessary or convenient to the full exercise of the granted powers and would be required to discharge its duties to the outside consumers as required by law. The petitioner has the power to acquire the works and system outside the district. If it should do so it would acquire such property subject to the burden or servitude of continuing the service and on no just principle could it continue to hold the property outside the district discharged thereof. (See

Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186 (56 Pac. 893.) To acquire the property with the burden so attached would not, therefore, be in excess of the powers of the district."

II.

THE MATTER IN CONTROVERSY DOES NOT ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

In support of this point we feel that counsel for appellees has effectively stated the argument. We wish, however, to supplement his answer to appellant's argument on this point by suggesting a further distinction of the authorities relied upon by appellant.

Appellant relies principally on four decisions of the United States Supreme Court, each one of which, to our mind, is distinguishable from the case at bar. Taking his authorities in the order in which they appear in his brief, we come first to the case of *Little York Gold Washing and Water Company, Ltd. v. Keyes,* 96 U. S. 199; 24 L. ed. 656. That case was before the court on a petition for the removal of the suit to the Circuit Court of the United States from the State Court of California where the action had been commenced. The suit was in the nature of a bill in equity to restrain plaintiffs in error from depositing tailings and debris from several mines in the channel of the river. The plaintiffs in error, in their petition for removal, claim the right to work, use and operate their mines and to use the channels of the river as the place of deposit for the debris under provisions of certain acts of Congress, which were claimed as a full

and complete defense to the action. Clearly the success of his claim depended wholly upon the construction of the Statutes, namely, the acts of Congress, which was a matter for the Federal Court to determine. Such construction was the actual issue of the case and did not arise in any collateral manner.

In the case at bar neither the appellant nor the appellees claim any right under the laws or constitution of the United States. To the contrary appellant claims that the appellee District, a municipal corporation of the State of California, has no power to accept the federal license and the appellee claims that it has such powers as are given to it by the Organic Act as enacted by the legislature of California. So, therefore, the real question is the construction of this Organic Act to determine whether or not the District has the power to make the contract with the government.

The next case cited by the appellant is *Binderup v. Pathe Exchance,* 263 U. S. 291, 68 L. ed. 308. That was an action brought against several defendants claiming that they were engaged in an unlawful combination and conspiracy in restraint of trade and commerce among several states, the same being a violation of that act of Congress commonly known as the Sherman Act. No argument is necessary to sustain the contention that such an action was one of federal jurisdiction, because, in order to determine the main issue, it was necessary to decide whether the acts complained of were a violation of the federal statute. No such situation confronts us in the case at bar, the only complaint here being that the District, through its board, is violating a statute of the State of California.

He next cites the case of *Siler v. Louisville N. R. Co.,* 213 U. S. 175, 53 L. ed. 753. In that case the bill filed by the company attacked the validity of an act of the legislature of Kentucky as being in violation of Section 1 of the 14th Amendment of the Constitution of the United States and of other amendments of the Federal Constitution. There the validity of the state statute was attacked, it being claimed that it was in violation of the Federal Constitution. Surely the Federal Court was given jurisdiction by such a claim as the real question at issue was whether or not the state statute violated the Federal Constitution; but in the case at bar the state statute, namely, the Organic Act, is not attacked nor is the agreement made by the District under the Organic Act attacked, as being in violation of any Federal Statute or of the Federal Constitution. The action of the District is attacked as being abusive of the discretionary powers of the Board of Directors.

The last case he cites in support of this contention is *Smith v. Kansas City Title Co.,* 255 U. S. 180. From appellant's own statement of facts in this case the question involved is readily distinguishable from the one at bar. The action was based upon the claim that the investment which the plaintiff was attempting to enjoin would be a waste of the funds of the defendant company, because the act of Congress creating the obligors on the bonds in which the company contemplated investing was unconstitutional and so the bonds were void. According to the complaint in that action defendant company was authorized to buy government, state or other bonds but could not invest in or buy any

such bonds not authorized to be issued by a valid law. The law authorizing the issue of the bonds in question was an act of Congress creating the federal land banks and joint stock land banks. Therefore the company not being allowed to invest in bonds which were not authorized by a valid law the real question presented was whether or not an act of Congress authorizing the issuance of these bonds was valid; we have no dispute with the holding that this presents an issue to be determined by the Federal Court.

In the instant case the appellant does not claim that the act of the United States under which the agreement is made with the appellee District is invalid or unconstitutional. Therefore the question arising in the Smith case does not come up here, nor does that case present any analogy.

CONCLUSION.

To summarize our views we respectfully maintain that the judgment of the lower court should be affirmed because

(a) The action taken by the directors of the District in accepting a license from the United States was within its power because the license in question is in legal effect similar to a lease and the District is given specific authority to take by lease

(b) No question is raised by the bill or the offered amended bill which is properly cognizable by the Federal Courts inasmuch as no attack is made upon the validity of any federal law and no claim is made

that any action taken by the District is in violation of any federal law, and

(c) For all the reasons urged in the brief filed by counsel for appellees.

We trust the court will condone our trespass upon its valuable time in consideration of the transcendent importance to our clients, Twohy Brothers Company and J. F. Shea Company, of a final legal affirmance of the action of the East Bay Municipal Utility District which culminated in the contracts between the District and the aforesaid contractors.

Dated, San Francisco,
November 17, 1926.

Respectfully submitted,

DeLancey C. Smith,
Amicus Curiae.